A

CHAMPION SCORE SDN BHD v. MOHD SOBRI CHEW ABDULLAH

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
AZIMAH OMAR JCA
B AZIZUL AZMI ADNAN JCA
[CIVIL APPEAL NO: P-02(NCvC)(W)-2249-12-2022]
12 NOVEMBER 2024

C **Abstract** – *(i) The standard form agreement under Schedule G of the Housing Development (Control and Licensing) Regulations 1989, under cl. 3(1), provides that the prior approval of a purchaser must first be obtained for the creation of a charge in favour of the developer. In the circumstances where the prescribed statutory contract contains such a clear prohibition, a charge created in favour of the developer without the* D *requisite consent of the purchaser, would render the instrument insufficient and thus null and void under s. 340(2)(b) of the National Land Code; (ii) A donee of a power of attorney must act strictly within the four corners of the power granted and cannot act beyond it. Once a donee exceeds the authority conferred to it, any instrument executed* E *beyond the scope of its power is null and void and has no legal power.*

LAND LAW: *Charge – Creation and validity of – Developer charged property to moneylender after receiving full purchase price – Whether developer stood in position* F *of bare trustee vis-à-vis purchaser – Whether bare trustee could create charge without consent of beneficial owner – Whether ownership no longer with developer upon payment of full purchase price – Whether power of attorney given by land proprietor to developer limited to effect transfer of subdivided titles to purchasers – Whether power to create charge over sold land prohibited under sale and purchase agreement – Whether instrument of charge insufficient instrument – Whether rendered charge* G *invalid, null and void – National Land Code, s. 340(2)(b)*

LAND LAW: *Indefeasibility of title and interest – Void instrument – Developer charged property to moneylender after receiving full purchase price – Power of attorney ('PA') granted by land proprietor to developer – Whether PA limited to* H *effect transfer of subdivided titles to purchasers – Whether ownership no longer with developer upon payment of full purchase price – Whether power to create charge over sold land prohibited under sale and purchase agreement – Whether fraudulent act – Whether instrument of charge insufficient instrument – Whether rendered charge invalid, null and void – Whether fell under exception to indefeasibility – National Land Code, s. 340(2)(b)*

I

The respondent ('plaintiff'), after having paid the full purchase price for a house in a development undertaken by Syarikat Perumahan Negara Bhd ('SPNB'), found that the title to his house for which he had taken possession, was the subject of a charge created over the property in favour of a moneylender ('appellant') by the developer. Upon the discovery, the plaintiff sued SPNB as the first defendant, the developer, UDI Property Sdn Bhd, as the second defendant ('developer') and the appellant, Champion Score Sdn Bhd, as the third defendant at the High Court. The plaintiff essentially prayed for the relief that the charge be cancelled and the title be transferred back to him as the rightful beneficial owner and further that SPNB and the developer were to effect the said transfer, failing which the Registrar of the court should execute the necessary transfer instrument. The sale and purchase agreement ('SPA') entered into with the plaintiff as the purchaser was a tri-partite SPA as prescribed under Schedule G of the Housing Development (Control and Licensing) Regulations 1989 ('Regulations'), with SPNB being named as proprietor of the land and the developer being a party to the SPA as well, being the vendor. SPNB had given an irrevocable power of attorney ('PA') to the developer for the purpose of the joint-venture to sign the relevant documents and statutory forms to ensure that the houses sold and paid by the purchasers were duly registered in the purchasers' name. It was the plaintiff's submission that (i) the developer, having received the full purchase price, stood in the position of a bare trustee and so, could not create a valid charge in favour of the appellant moneylender; (ii) the charge instrument under the National Land Code ('NLC') was a void instrument and the charge was null and void and ought to be set aside; and (iii) the charge could not have been validly created without the consent of the plaintiff as the purchaser. The High Court granted the order prayed by the plaintiff and cancelled the charge and further ordered the transfer of the title to the plaintiff. Only the appellant moneylender appealed against the decision. In this appeal, the appellant contended, *inter alia*: (i) it was equally *bona fide* as it was the developer who had misrepresented to it that the subdivided title had not been the subject matter of any SPA; (ii) it was an immediate purchaser or transferee as there were no other dealings on the title from SPNB's name other than the charge created *via* an irrevocable PA in its favour. The charge created was thus indefeasible, having being duly registered and in the absence of the vitiating factors; (iii) the exceptions to indefeasibility under s. 340(2) of the NLC did not apply to it as it was not a party or privy to the fraud, there was no forgery and that the instrument of charge was not void nor insufficient but was valid, registrable and indeed registered; and (iv) the fact of the plaintiff purchaser being the beneficial owner with the proprietor and developer as the bare trustee was only good with respect to the purchaser's claim *in personam* against the proprietor and developer, and not the moneylender who had acquired its interest in the charge *in rem*.

Held (dismissing appeal; upholding decision of High Court)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) Upon receipt of the full purchase price by the developer, SPNB, as proprietor, and the developer, as vendor, stood in the position as bare trustees *vis-à-vis* the purchaser. However, a charge created by a bare trustee without the beneficial owner's consent is void as the bare trustee had no legal authority to create the charge. The appellant's assertion that it was a *bona fide* purchaser, did not assist the appellant when confronted with the vitiating factor of an insufficient instrument as the charge created was void under s. 340(2)(b) of the NLC. The appellant also was not a subsequent purchaser but an immediate purchaser whose interest may be set aside if any of the vitiating factors was found. Thus, the charge created in favour of the appellant, when the proprietor and the developer as the vendor, were bare trustees for the purchaser, was invalid, null and void and was rightly cancelled and set aside by the High Court. (paras 24, 29, 32 & 41)

(2) SPNB, being the company set up to provide housing accommodation to the lower income group in the country, did not give the PA to the developer to create a charge over a subdivided title which ownership was no longer with the developer but which had been sold to the purchaser and which purchase price had been fully paid. The power to create a charge cannot be to create a charge over a piece of land that had been sold. That was not only prohibited under the SPA, but it would also be fraudulent on the purchaser, whose interest SPNB would be the first to protect. The developer would only have so much power under the PA to do all that was necessary to effect a transfer of the subdivided titles to the purchasers. (paras 44, 46 & 49)

(3) If a donee of a PA exceeds its authority, then any instrument executed beyond the scope of its power is null and void, invalid and has no legal effect. The second PA was granted by SPNB to the developer to facilitate implementation of the second supplementary agreement and completion of the mosque and tahfiz school. By no stretch of the imagination may the PA be interpreted to confer power on the developer to charge to a lender any of the subdivided titles of any of the houses built thereon which had already been sold to purchasers. This was even more so when the full purchase price to the property had been paid by the purchaser. Hence, it was a clear case of abuse of the PA and venturing beyond the scope of powers of the PA by the developer. The instrument of charge in Form 16A executed by the developer as an attorney for SPNB was thus an insufficient instrument that rendered the charge indefeasible and liable to be impugned and set aside under s. 340(2)(b) of the NLC. The title with the charge duly cancelled was to be transferred to the plaintiff purchaser who had paid the full purchase price. (paras 53, 54, 56, 58, 59 & 62)

(4) Even though the proprietor SPNB had given an irrevocable PA to the developer for the purpose of the joint-venture, the legal obligation rested jointly with SPNB and the developer to ensure that the purchaser received a title free from all encumbrances, once the full purchase price was paid. The developer was in liquidation and may not be interested in the matter anymore. However, SPNB, as a Government agency, has a social if not legal responsibility to ensure that a purchaser of their housing project who has paid the full purchase price would obtain the subdivided title in his name. (paras 64 & 68)

(5) It is the duty of the court to invoke public policy where evidence reveals that a contract or action is contrary to public interest; *Theresa Chong v. Kin Khoon & Co*. In the present case, the public policy imperative was to protect the first purchaser's right to the property, which would be unjustly defeated if the appellant's charge was allowed to stand. Allowing financial institutions to assert charges against a purchaser's equitable interest would directly undermine public confidence in property transactions especially in housing development cases under the statutory contract regime provided in the HDA and its Regulations designed to protect innocent house buyers who have no good reason to suspect that the developer would charge to a lender the property already sold to them. Therefore, after careful consideration, the court invoked public policy to preserve and protect the interest and title of the innocent purchaser who otherwise would be left high and dry without any effective remedy as the developer had gone into liquidation. (paras 94, 96 & 99)

Case(s) referred to:

Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors [2022] 2 CLJ 1 FC ***(refd)***

Bitara Angkasa Sdn Bhd v. Cheok Lam Chuan & Ors [2024] 1 CLJ 202 CA ***(refd)***

Choo Ah Kow v. Yeow Yew Thiam & Anor [1989] 1 CLJ 128; [1989] 1 CLJ (Rep) 14 SC ***(refd)***

CIMB Bank Bhd v. AmBank (M) Bhd & Ors [2017] 9 CLJ 145 FC ***(refd)***

Enderby Town Football Club Ltd v. The Football Association Ltd & Anor [1971] 1 All ER 215 ***(refd)***

Foong Seong Equipment Sdn Bhd v. Keris Properties (PK) Sdn Bhd [2011] 4 CLJ 42 CA ***(refd)***

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2019] 1 CLJ 183 FC ***(refd)***

Monkland v. Jack Barclay Ld [1951] 2 KB 252 ***(refd)***

Ng Pak Mei v. Sierra Delima Development Sdn Bhd & Anor [2020] 9 CLJ 101 CA ***(refd)***

Ong Chat Pang & Anor v. Valliapa Chettiar [1971] CLJU 96; [1971] 1 LNS 96 FC ***(refd)***

Patel v. Mirza [2017] AC 467 ***(refd)***

Perwira Habib Bank Malaysia Bhd v. Viswanathan Ramakrishnan [1996] 2 CLJ 505 HC ***(refd)***
PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor & Other Appeals [2021] 2 CLJ 441 FC ***(refd)***
Prudentdeals Sdn Bhd v. YM Tengku Abdul Halim Ibni Almarhum Sultan Ibrahim [2015] CLJU 5; [2015] 1 LNS 5 CA ***(refd)***
Richardson v. Mellish (1824) 2 BING 229 ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
SEA Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***
Tan Keen Keong v. Tan Eng Hong Paper & Stationery Sdn Bhd & Ors And Other Appeals [2021] 2 CLJ 318 FC ***(refd)***
Thameez Nisha Hasseem v. Maybank Allied Bank Bhd [2023] 5 CLJ 874 FC ***(foll)***
Theresa Chong v. Kin Khoon & Co [1976] CLJU 165; [1976] 1 LNS 165 FC ***(refd)***
Thye Seng & Company Sdn Bhd & Ors v. Universal Trustee (Malaysia) Bhd & Ors [2016] CLJU 1707; [2016] 1 LNS 1707 HC ***(refd)***

Legislation referred to:
Housing Development (Control and Licensing) Regulations 1989, reg. 11(1), Schedule G cl. 3(1)
National Land Code, ss. 22, 256(3), 340(2)(b), (3)

Other source(s) referred to:
Trevor M Aldridge in Powers of Attorney 10th edn, 2007, Thomson Sweet Maxwell, London, p 11

For the appellant - Ooi Zie Yiong; M/s Phee, Chen & Ung
For the respondent - Neoh Hor Kee, Goo Chun Kit & Dylan Navarednam; M/s Anual & Foong

[Editor's note: For the High Court judgment, please see Mohd Sobri Chew Abdullah v. Syarikat Perumahan Negara Bhd & Ors [2022] CLJU 2911; [2022] 1 LNS 2911 (affirmed).]

Reported by S Barathi

JUDGMENT

Lee Swee Seng JCA:

[1] No one, and certainly not the plaintiff in the High Court below, would have thought that after paying the full purchase price for a house in a development undertaken by Syarikat Perumahan Negara Bhd ('SPNB'), he would be shockingly awakened to the reality that the title to his house for which he had taken possession, is now the subject of a charge created over the property in favour of a moneylender by the developer.

[2] After all, one would expect a developer who had entered into a joint-venture with SPNB to develop the master titles into a housing estate to have the decency to abide by its contractual obligation under the statutorily prescribed sale and purchase agreement ('SPA') in the form of Schedule G of the Housing Development (Control and Licensing) Regulations 1989 ('the

Housing Regulations'). That obligation included not to encumber the property upon an SPA being signed with the purchaser, and more importantly to undertake as required under the statutory contract, to deliver an unencumbered title to the house after completion and the payment of the full purchase price.

[3] Upon discovery of this horror, the house buyer sued SPNB as the first defendant ('D1'), UDI Property Sdn Bhd, the developer as the second defendant ('D2') and the moneylender Champion Score Sdn Bhd, as the third defendant ('D3') in the High Court below. The plaintiff essentially prayed for the relief that the charge be cancelled and the title be transferred back to him as the rightful beneficial owner and further that D1 and D2 are to effect the said transfer failing which the registrar of the court shall execute the necessary transfer instrument.

[4] The SPA entered into with the plaintiff as purchaser is a tri-partite SPA as prescribed under Schedule G of the Regulations with SPNB being named as proprietor of the land and the developer being a party to the SPA as well, being the vendor. It transpired that SPNB had given an irrevocable power of attorney ('PA') to the developer for the purpose of the joint-venture to sign the relevant documents and statutory forms to ensure that the houses sold and paid by the purchasers are duly registered in the purchasers' name.

At The High Court

[5] The plaintiff submitted that the developer, having received the full purchase price, stood in the position of a bare trustee and so could not create a valid charge in favour of the moneylender. The charge instrument under the National Land Code ('NLC') was a void instrument and the charge created was null and void and so ought to be set aside.

[6] Moreover, the charge could not have been validly created without the consent of the plaintiff as purchaser and the plaintiff had not consented to the charge being created. No purchaser would anyway, unless it is for a loan taken by the purchaser and the charge created as a security for the loan taken.

[7] The moneylender argued that under the Torrens system of land registration, it had made a search on the subdivided titles provided as security for the loan granted to the developer and the subdivided titles showed that they were all free from encumbrances. There was no need to inquire further as in "going behind the title" as under the mirror principle in the Torrens system of land registration, the title is everything and what is not reflected in the title by way of registration or endorsement cannot bind a prospective transferee who is not a party to the fraud.

[8] The charge created in favour of the moneylender was thus argued to be indefeasible, the other common exceptions of forgery and insufficient or void instrument being not applicable.

[9] The High Court agreed with the plaintiff and based on the authorities of the Federal Court in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1 ('*Samuel Naik*') and *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271; [2020] 4 MLJ 662 ('*He-Con*'), the proprietor and developer were just mere bare trustees and no valid charge could be created by them, whether under the irrevocable PA or otherwise. The High Court agreed with the plaintiff that the charge was created *via* an insufficient or void instrument and thus is null and void and had to be cancelled or set aside.

[10] The High Court granted the orders the plaintiff prayed for and cancelled the charge and further ordered the transfer of the title to the plaintiff. The developer, having gone into liquidation, did not defend the suit and did not appeal. Neither did SPNB appeal, perhaps conscious of its declared objective to provide housing accommodation for the lower income group in the country.

[11] Only the moneylender appealed and it is the appellant here and the plaintiff is the respondent in this appeal.

In The Court Of Appeal

[12] The appellant moneylender contended that it is equally *bona fide* as in it was the developer who had misrepresented to it that the subdivided title had not been the subject matter of any SPA. The appellant said it had no reason to doubt the developer's representation which later turned out to be false or not true.

[13] The appellant moneylender argued that it was an immediate purchaser or transferee as there were no other dealings on the title from SPNB's name other than the charge created *via* an irrevocable PA in its favour. The charge created is thus indefeasible, having been duly registered and in the absence of the vitiating factors.

[14] The appellant argued that the exceptions to indefeasibility under s. 340(2) of the NLC do not apply to it as it was not a party or privy to the fraud, that there was no forgery here and further that the instrument of charge was not void nor insufficient but was valid, registrable and indeed registered.

[15] The appellant said that the fact of the plaintiff purchaser being the beneficial owner with the proprietor and developer as the bare trustee is only good with respect to the purchaser's claim *in personam* against the proprietor and developer, and not the moneylender who had acquired its interest in the charge *in rem*.

[16] It was argued for the moneylender that there was nothing wrong with the instrument of charge for it was validly registered under the NLC at the land office and reflected in the register document of title and issue document of title.

[17] The respondent purchaser argued that even if the charge instrument was valid, this court must recognise that the statutory contract as prescribed under the Housing Regulations made under the Housing Development (Control and Licensing) Act 1966 ('HDA') is a piece of social legislation designed by Parliament to protect the weaker party in the house buyers who are often taken advantage of by developers.

[18] Thus, both Parliament and the Executive had come to the fore to intervene in the freedom of contract such that a statutory contract is prescribed with the standard terms and conditions which the developer cannot contract out of including not to encumber the title once the house has been sold and an undertaking to deliver the title duly registered in the purchaser's name free from encumbrances once the full purchase price has been paid.

[19] Thus, the court must incline towards protecting the interest of the purchaser who is often left at the mercy of the developer who would not allow the purchaser to caveat the land on ground that the subdivided titles would not readily be issued if there are caveats on the master title or else the caveat lodged would appear on every subdivided title.

Whether The Developer/Vendor As A Bare Trustee For The Purchaser Can Create A Valid Charge Over The Same Land

[20] This housing project, 'The Golf Garden' (Taman Halaman Indah) in Mukim 6, Seberang Perai Selatan District, Penang is a joint-venture project between SPNB as proprietor and the developer. Various joint-venture agreements including a project purchase agreement dated 11 June 2010 and a second supplementary agreement dated 26 August 2016 were signed to set out the terms and conditions of the joint-venture. An irrevocable PA dated 26 August 2016 was also given by SPNB to the developer to facilitate the execution of the SPA and the performance of the joint-venture agreement.

[21] At the point of the signing of the tripartite SPA dated 21 February 2012, details of the master titles were stated in the preamble as held under H.S.(D) 36926, PT 426, H.S.(D) 36927, PT 427, and H.S.(D) 36928, PT 428 in Mukim 06, District of Seberang Perai Selatan, State of Pulau Pinang in an area measuring approximately 38.4909 hectares.

[22] The single-storey house bought by the purchaser was identified as No. H.S.(D): 41313 Plot/Lot No: 747 Mukim 06 District of Seberang Perai Selatan, State of Pulau Pinang.

[23] It was established in the High Court below that the plaintiff purchaser had fully paid the agreed discounted purchase price of RM69,000 before the charge bearing Presentation No. 0799SC20170 was created for the appellant. At para. 42 of the grounds of judgment ("GOJ") of the High Court, it was observed as follows:

A [42] It is my finding that the creation of the Charge is a breach of trust on the part of D1 and D2. Because at the time of the creation of the Charge (on 28.8.2017), D1 was holding the Property as a bare trustee for P (following P's payment of the full purchase price for the Property on 23.2.2012).

B **[24]** The position of the law is that upon receipt of the full purchase price by the developer, the SPNB as proprietor and the developer as vendor stood in the position as bare trustees *vis-à-vis* the purchaser.

[25] We are fully conscious of what was declared in *Samuel Naik*. In *Samuel Naik*, Ramly Ali FCJ, in delivering the judgment of the Federal Court,
C emphasised at p. 965 (CLJ); pp. 22 to 23 (MLJ) as follows:

[53] We are in full agreement and adopt the above well founded principles of law which, according to Jessel MR in *Lysaght*'s case, 'has been settled for centuries'. Applying the said principles to the facts of the present case before us, we hold that MPM, being the registered proprietor of the land
D after executing the sale and purchase agreements with the earlier purchasers and having received the full purchase price, was a bare trustee (that is, a person without beneficial interest in the property); and to borrow the words of Jessel, MR in *Lysaght*'s case '… the court will not permit the vendor afterwards to transfer the legal estate to a third person'. In other words, MPM in the present case, was therefore not permitted in
E law to sell or transfer the land to the new purchasers (including the appellant).

[54] The Court of Appeal was right in finding that MPM, after having entered in the sale and purchase agreements with the earlier purchasers and received the full payments of the purchase price, had become a bare
F trustee and as such was not permitted to deal with the lots. We are in agreement with the Court of Appeal that the subsequent sales, transfers or conveyances of the lots by MPM to the new purchasers (including the appellant) were void *ab initio*, as MPM did not have any legal or requisite capacity to enter into such agreements.

G **[26]** His Lordship further concluded at p. 974 (CLJ); p. 31 (MLJ):

[86] Accordingly, for reasons already given we would answer the question posed to us in the affirmative: 'that the title of registered proprietor who was a *bona fide* immediate purchaser without notice under the National Land Code (Act 56 of 1965) can be defeated by the non-registered valid equitable interest of an absolute assignee under an earlier sale and
H purchase agreement in respect of the same piece of land with another purchaser who was not the appellant.

[27] In the above-mentioned *Samuel Naik*'s case, Majlis Perbandaran Manjung ("MPM"), the registered proprietor appointed a developer to subdivide land and entered into sale and purchase agreements with earlier
I purchasers. Public Bank Bhd financed these purchases through loan agreements secured by deeds of assignment. After receiving full payment,

MPM became a bare trustee and had no authority to deal with the property. Unbeknown to the bank, MPM sold and transferred the lots to new purchasers, including Samuel Naik Siang Ting, without delivering the titles to the bank as required. Upon discovering this, the bank lodged private caveats and sought a court declaration to void the transfers and restore the earlier purchasers' rights. The issue before the court was whether the title of a *bona fide* registered proprietor without notice under the NLC could be defeated by an unregistered equitable interest of an assignee/lender under an earlier SPA. The Federal Court ruled in favour of Public Bank, holding that the subsequent transfers were void because MPM, as a bare trustee, lacked authority to sell the lots. The deeds of assignment were treated as equitable mortgages, giving the bank an equitable interest. The registered titles of the new purchasers were defeasible under s. 340(2)(b) of the NLC as they were obtained through insufficient or void instruments.

[28] More recently, in the year 2020, Abang Iskandar FCJ (now PCA) delivered the judgment of the Federal Court in *He-Con*, affirmed at para. 100 as follows:

> [100] As such, we agree with the COA that the fourth defendant was an immediate purchaser and was therefore not protected under the proviso to s. 340(3) of NLC. Its registered charge over the said property is not entitled to the protection of the shield of indefeasibility. It had purchased the interest in the property from the first defendant who had no interest to be dealt with anybody and to the detriment of the deceased. On account of the *Hadley, Yeong Ah Chee, Samuel Naik* and *Kamarulzaman*'s case, it is clear to our minds that the vendor had become a bare trustee and that when it created a charge over the land and used the land as a security for a loan from the fourth defendant, it had no more proprietary interest in the property, other than as a bare trustee. The charge transaction was null and void, pursuant to s. 340(2) NLC. As an immediate purchaser, the fourth defendant was not entitled to protection under the proviso to s. 340(3) NLC, regardless of its fides. As such, not only the original owners that may lose out, but an innocent immediate purchaser may also suffer the fatal deprivation of the protection afforded under the proviso to s. 340(3) NLC. Indeed, learned Justice Richard Malanjum, CJSS (as he was then), in *Pushpaleela*'s case had occasion to make the following remarks:
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> > In fact, in some cases, the party losing out may not necessarily always be the original registered proprietor. It may even be the immediate purchaser affected by the application of the principle of deferred indefeasibility as affirmed by this court in the case of *Tan Yin Hong v. Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 at para 53. Thus, as between a *bona fide* immediate purchaser and the original registered proprietor, the said immediate purchaser stands to lose by reason of the fraud of another.

[29] In *He-Con*'s case, the dispute centred on whether a trustee without beneficial ownership could validly create an encumbrance without the owner's authority. The deceased entered into a sale and purchase agreement with He-Con Sdn Bhd for a property and fully paid the purchase price, thereby becoming the beneficial owner. Despite this, He-Con, acting as a bare trustee, charged the property to a financial institution without the deceased's consent. The plaintiffs (administrators of the deceased's estate) sought a declaration that the charge was void and that the deceased remained the rightful owner. The issue was whether a charge created by a bare trustee without the beneficial owner's consent is valid under s. 340 of the NLC. The Federal Court declared the charge void, affirming that He-Con had no legal authority to create the charge as a bare trustee.

[30] Recently in the Court of Appeal's case of *Bitara Angkasa Sdn Bhd v. Cheok Lam Chuan & Ors* [2024] 1 CLJ 202; [2024] 1 MLRA 577, Lim Chong Fong JCA expressed his difficulty in following through with the principle enunciated in the Federal Court's decision in *He-Con*'s case. His Lordship observed that the *He-Con*'s decision was heavily influenced by the dissenting judgment of Jeffrey Tan FCJ in *CIMB Bank Bhd v. AmBank (M) Bhd & Ors* [2017] 9 CLJ 145; [2017] 5 MLRA 1, rather than the majority opinion delivered by Md Raus Sharif CJ. Lim Chong Fong JCA noted as follows:

> [34] It must nonetheless be noted the case of *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* (*supra*) was decided relying on the dissenting judgment of Jeffery Tan FCJ in *CIMB Bank Berhad v. AmBank (M) & Ors* [2017] 5 MLRA 1 FC. In the majority judgment, Md Raus Sharif CJ held as follows with emphasis added by us:
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> > [31] This concept of indefeasibility was further explained by this court in the case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 2 MLRA 432 where Jeffrey Tan FCJ said:
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> > > [41] Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to the trial courts. Whenever a registered title or interest is sought to be set aside under s. 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser, the *bona fide* of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s. 340(2) had been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s. 340(2) would not affect the title or interest of a *bona fide* subsequent purchaser. The title or interest of a subsequent

> purchaser is only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith for a valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.
>
> …
>
> [35] As always, every case is fact sensitive including on applying the law to them.

[31] There was no record of the aggrieved party in Pendaftar Hak Milik Tanah appealing against the judgment of the Court of Appeal in *Bitara Angkasa*'s case where at para. [67] thereof judgment was entered against the Pendaftar to compensate under s. 22 of the NLC to the real owner who had lost his land through the fraudster.

[32] The fact that the appellant asserted that it is a *bona fide* purchaser does not assist it at all when confronted with the vitiating factor of an insufficient instrument as the charge created is void under s. 340(2)(b) of the NLC. Moreover, the appellant is not a subsequent purchaser but an immediate purchaser whose interest may be set aside if any of the vitiating factors is found. Section 340(3) of the NLC has no relevance to the appellant's assertion as so held by the learned High Court Judge as follows:

> [50] In my opinion, D3 is not protected by the proviso to section 340(3) of the NLC as it is an immediate interest holder. By reason that D3 obtained the Charge from D1 and D2, who had no right or capacity to provide the same. As an immediate interest holder, D3's Charge over the Property is liable to be set aside regardless of whether it is a *bona fide* purchaser for value without notice. I refer to the the (*sic*) following authorities.

[33] The High Court also referred to the Federal Court case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987 at p. 1025 and para. [41] referred to above.

[34] We appreciate that in a Torrens system of land registration, it may be too much to expect of an immediate or subsequent transferee to have known of the fact that the transferor stands in the position of a bare trustee *vis-à-vis* an unregistered purchaser who had paid the full purchase price to the transferor. After all, there is a system of notification to the world in the form of a caveat that may be entered against the land by a caveator who has title or interest in the land or a right to such title or interest.

[35] One must also bear in mind the mirror principle and curtain principle that are characteristics of the Torrens system of land registration which is not just a system of registration of titles and interests but a system of titles and interests by registration. The subtle but significance difference is that

registration is everything and a prior unregistered title and interest may have to give way to a subsequent registered title and interest unless there are vitiating factors operating such as fraud to which the immediate transferee is a party or privy or that the instrument of transfer or creation of interest had been forged or that the instrument is insufficient or void or otherwise the dealing is prohibited by law.

[36] The title is everything under the 'mirror' principle in that the title kept at the land registry called the register document of title is a correct reflection of all dealings with respect to the land in question. The title that one has in possession called the issue document of title correctly reflects what is on the title in terms of registered dealings which is all that an interested purchaser or chargee should be concerned with.

[37] Under the curtain principle, one does not have to look behind the "curtain" so to speak to find out if there were prior dealings which had not been registered on the title or at least notified by way of a caveat or some endorsements. See the Federal Court's decision of *Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors* [2022] 2 CLJ 1; [2022] 1 MLJ 701 at para. 27:

> [27] It is trite that land law in Malaysia is based on title and interest by registration which is derived from the Torrens System. There are two fundamental principles of the Torrens System, namely the mirror principle and the curtain principle. The mirror principle portrays a concept in which the land title mirrors all relevant and material details that a perspective purchaser, lessee and chargee ought to know. This means that a person can obtain all such material information of the land, based on what is endorsed on the register of document of title and issue document of title. On the other hand, the curtain principle is a concept that dispenses with the need to look beyond the register – as the land itself provides all relevant information reflecting the validity of the same. Ostensibly, the "curtain" is where the principle took its name from.

[38] Absent any vitiating factors as above stated, the immediate transferee's title or interest is good against the world and is indefeasible as in immunised from any extraneous attack.

[39] Until these cases in *Samuel Naik* and *He-Con* are expressly or impliedly overruled, they may be relied upon to protect the interest of an unregistered prior purchaser in cases of housing development even though a subsequent purchaser or chargee as in this case, took the charge without notice of the first purchaser's prior interest or title.

[40] It would appear that at the end of the day, the Federal Court in *Samuel Naik* and *He-Con* had decided based on policy consideration to protect the weaker party in housing development whose title or interest had arisen first in time though not duly registered.

[41] Thus, the charge created in favour of the appellant when the proprietor and the developer as the vendor are bare trustees for the purchaser, is invalid, null and void and was rightly cancelled and set aside by the High Court.

Whether The Charge Instrument Executed By The Developer Under The Irrevocable PA Was An Insufficient Instrument Rendering The Charge Defeasible

[42] Section 340 of the NLC provides as follows:

> **Registration to confer indefeasible title or interest, except in certain circumstances**
>
> 340. (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible –
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) –
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (4) Nothing in this section shall prejudice or prevent –
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) the determination of any title or interest by operation of law.

[43] It is not unusual for a proprietor of a piece of land to be developed by a developer under a joint-venture agreement to have given a PA to the developer for ease of applying for approvals of building plans and development order, signing SPAs, applying for various approvals from the local authorities and the utility companies and finally when the subdivided titles are issued, to transfer the titles to the purchasers.

[44] SPNB being the company set up to provide housing accommodation to the lower income group in the country did not give the PA to the developer to create a charge over a subdivided title which ownership is no longer with the developer but which had been sold to the purchaser and which purchase price had been fully paid.

[45] Anyone representing a chargee where the chargor had executed the charge *via* a PA would request for a copy of the PA and scrutinise its terms to ensure that it is duly registered with the High Court and the relevant land office and that what is sought to be done under the PA is duly authorised as in within the ambit of the PA.

[46] The power to create a charge cannot be to create a charge over a piece of land that had been sold. That is prohibited not only under the SPA but that it would be fraudulent to the purchaser whose interest SPNB would be the first to protect, being set up to advance a national interest on providing housing accommodation.

[47] In fact, its website https://spnb.com.my/en/about/ read as follows:

> SYARIKAT PERUMAHAN NEGARA BERHAD (SPNB) is a national housing development company owned by the Minister of Finance (Incorporated) and has been established since 1997.
>
> SPNB is now under the purview of Ministry of Housing and Local Government (KPKT) effective 3 August 2018.
>
> Vision
>
> To become the preferred choice of the Malaysian public in providing for affordable homes.
>
> Mission
>
> We aim to not only develop affordable homes for the Malaysian public but to also provide homes that are high in quality and fits the demand of the market through a culture of excellence, bridging the gap between affordability to ensure ownership of homes and to also become a property developer that plays its role in its social responsibility.
>
> Motto
>
> Your home, our responsibility.

[48] In 2001, the Ministry of Urban Wellbeing, Housing and Local Government (KPKT) appointed SPNB as implementation agent for the rehabilitation of abandoned projects. It is an admitted fact that the present project had become a "sick" or "abandoned" project. Anyone doing a limited due diligence before lending would have known of the suspension of works relating to this housing project and its abandonment for a long while.

[49] The developer would only have so much power under the PA to do all that is necessary to effect a transfer of the subdivided titles to the purchasers. Whilst it gives the power to create a charge, it cannot extend to using the PA to create a charge over a subdivided title which property had already been sold to purchaser. The donee of the PA cannot do that which the donor itself cannot do.

[50] Any instrument of charge executed with an insufficient PA would render the instrument void or insufficient with the result that a charge so created is invalid, null and void. The chargor under the PA had exceeded its powers granted to it by the donor and so the charge created is invalid, null and void.

[51] The relevant powers of the developer under the PA are as follows:

> 14. *to sign and deliver the Sale and Purchase Agreements with the Purchasers,* any deed, assurance, undertaking, conveyances or instrument and documents whatsoever in writing including *Memorandum of Transfers for the purposes of transferring and vesting the legal title and beneficial ownership of the residential and commercial units in favour of end-purchasers and to do every other thing whatsoever which may be necessary or proper for carrying any agreement into complete effect and execution in such manner that all the Donor's estate right title and interest in or to the said Lands or any part thereof and/or any houses erected thereon and the contents thereof may be effectually and absolutely conveyed and assured unto the respective purchaser thereof* or unto other person or persons and for such interest therein and in such manner and form as he or they shall direct or appoint;
>
> 15. to sign, issue or deliver letters of undertaking to financial Institutions or other persons or corporation to give consent to the assignment of beneficial ownership by end-purchasers of the units for the purposes of securing loans given to these end-purchasers by the financial Institutions, persons or corporation to purchase the units.
>
> 16. to receive any payment for the sale of any houses and shophouses to be erected on the said Lands and to give a good receipt or receipts therefrom.
>
> 17. to collect and receive from all such end-purchasers any monies payable In respect of the sale of any units as provided by Schedule G or H of the Housing Developers (Control and Licensing) Regulations 1989 as required under Regulation 10 of the same. (emphasis added)

[52] The power to charge that is enumerated subsequently in para. 24 must be read subject to the above paragraphs of the PA:

> 2. To charge, or create lien and/ or encumber the said Land or part thereof and to do all whatever acts and execute all charges, annexures, forms, and other relevant documents, to give effect to such transactions which may be deemed necessary or expedient to perfect such charges, in continuation and to procure its registration with the relevant Land Office or registries or other relevant authorities as the Attorney deems fit.

[53] Moreover, this PA is the second PA granted by SPNB to the developer pursuant to the second supplementary agreement dated the same date, *ie*, 26 August 2016 where the High Court had observed as follows:

> [79] For the purpose of settlement of the balance sum due and owing by D2 to D1 under the Project Purchase Agreement, D1 agreed to enter into the Supplementary Agreement with D2. The Supplementary Agreement was executed between D1 and D2 as a result of D2's inability to pay to D1 the balance sum as agreed upon in the Project Purchase Agreement. The settlement was of 2 types ie settlement in kind and cash settlement.
>
> [80] For settlement in kind, it was agreed by both parties that D2 will build a mosque and a tahfiz school within a period of 36 months. The salient provision reads:

F. Both parties have further agreed that the Balance Sum shall be inclusive of the cost of building a mosque and a 'tahfiz school' (hereinafter referred to as the Masjid and Sekolah Tahfiz) to be exclusively built by UPSB in the said Project wherein UPSB shall complete the Masjid and Sekolah Tahfiz within 36 MONTHS from the date of UPSB having obtained the Certificate of Completion and Compliance from the relevant authority for the said Project and also during this period of time the Shophouses shall be sold by UPSB.

G. Both parties now desire to enter into this 2nd Supplementary Agreement to come to a mutual settlement in respect of the Balance Sum with clarity, certainty and finality and set out the manner of the settlement of the Balance Sum upon and subject always to the terms and conditions as set forth in this 2nd Supplementary Agreement.

[54] For this specific purpose, D1 agreed to execute a power of attorney dated 26 August 2016 ('supplemental PA') to facilitate implementation of the supplementary agreement and completion of the mosque and tahfiz school.

[55] The Court of Appeal in *Prudentdeals Sdn Bhd v. YM Tengku Abdul Halim Ibni Almarhum Sultan Ibrahim* [2015] CLJU 5; [2015] 1 LNS 5; [2015] 2 MLJ 801 provided guidance on how a PA should be interpreted as follows:

> [24] The court is mindful that a *power of attorney is to be construed strictly by the courts according to well recognised rules.* The powers of an attorney are interpreted as giving only such authority as they confer expressly or by necessary implication (see *Boustead on Agency* (13th Edn) at page 65). *The deed must be construed so as to include all incidental powers necessary for its effective execution* (see *Bank Bumiputra Malaysia Bhd v. Henry Ginai anak Langgie* [1990] 1 MLJ 296). The power of attorney is not an ambiguous instrument, *it is a delegation of all rights, powers and duties, and it requires the formalities before it can be recognised and acted upon.*

> [25] To determine the powers granted under a power of attorney, the *purpose or intention of the donor is relevant to the extent provided for in the deed* (see *Sekh Abu Bakar Ahmad lwn. Sheikh Omar Sheikh Abdullah Dan Satu Lagi* [1998] MLJU 40; [1998] 3 CLJ 316). (emphasis added)

[56] By no stretch of the imagination may the PA be interpreted to confer power on the developer to charge to a lender any of the subdivided titles of any of the houses built thereon which had already been sold to purchasers. This is even more so when the full purchase price of the property had been paid in this case by the purchaser.

[57] SPNB did not and could not have agreed to the developer creating a charge over a subdivided title which property represented in it had been sold to a purchaser in the plaintiff and which purchase price had been fully paid. As an agency with the Minister of Finance, and later having being appointed by the Minister of Urban Wellbeing, Housing and Local Government to revive abandoned housing projects, it was required to ensure that the provisions of the prescribed form of SPA under the Housing Regulations made under the HDA under the purview of the said Minister of Urban Wellbeing, Housing and Local Government, be scrupulously complied with.

[58] It is a clear case of abuse of the PA and venturing beyond the scope of powers of the PA by the developer. The charge which SPNB would not and could not create, cannot in the circumstances of this case, have been created by the developer. The donee cannot do that which the donor could not do.

[59] If a donee of a PA exceeds its authority then any instrument executed beyond the scope of its power is null and void, invalid and has no legal effect. A donee must act strictly within the limits of the power granted and cannot act beyond it. Trevor M Aldridge in *Powers of Attorney* 10th edn, 2007, Thomson Sweet Maxwell, London at p. 11 said:

> Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.
>
> (*Bryant, Powis and Bryant Ltd. v. La Banque du Peuple* [1893] AC 170 at 177 per Lord Macnaghten).
>
> 2-01 A transaction entered into by an attorney is not valid if it falls outside the scope of the power of attorney …

[60] Similarly, *Halsbury's Laws of Malaysia - Powers of Attorney* (vol. 11(2)), under para. [320.027] said that:

> ... In some circumstances, a third party may have a duty of care to at least inquire into the circumstances surrounding the execution of a power of attorney, the purpose of its execution and the limitations imposed on it by law …

[61] In *Perwira Habib Bank Malaysia Bhd v. Viswanathan Ramakrishnan* [1996] 2 CLJ 505; [1997] 4 MLJ 474 at p. 481 para. F-G and at p. 484 para. A it was observed as follows:

> However, there could be no dispute from the letters of the power of attorney and the agreement annexed to the charge, that the holder of the power of attorney Robert Cheong had exceeded his authority by charging the defendant's lands to the plaintiff to secure a loan not for Lee and Chong Sdn Bhd., as authorised but for another company Teong Kong Enterprise Sdn Bhd., contrary to the specific power granted to him under cl. 6 of the power of attorney …
>
> …
>
> A registered charge obtained from an agent of the defendant who had acted in excess of the authority granted to him under a power of attorney as in the present case would in my view, constitute a charge that is obtained by means of an insufficient instrument within the meaning of this provision [s. 340(2)(b) NLC] which would operate to deny the plaintiff of his indefeasibility.

[62] The instrument of charge in Form 16A at encl. 5 pdf 64 executed by the developer as an attorney for SPNB is thus an insufficient instrument. The charge created by an insufficient instrument is not an indefeasible charge and liable to be impugned and set aside under s. 340(2)(b) of the NLC. This exception to indefeasibility under s. 340(2)(b) on ground that the charge was created under an insufficient instrument could be invoked to nullify the charge created with the result that the charge is invalid, null and void and ought to be cancelled and expunged from the title. The title with the charge duly cancelled is to be transferred to the plaintiff purchaser who had paid the full purchase price.

[63] The High Court had proceeded to order both D1 SPNB as proprietor and D2 the developer to effect the transfer of the property to the plaintiff within 14 days from the date of the High Court's judgment and failing which, the Senior Assistant Registrar of the court is authorised to sign the transfer instrument and all relevant documents so that the property can be transferred to and be registered in the name of the plaintiff. See paras. [94] to [95] of the High Court's GOJ.

[64] Both SPNB and the developer did not appeal against the said decision of the High Court. Whilst the developer is in liquidation and may not be interested in the matter anymore, SPNB being a Government agency has a social if not legal responsibility to ensure that a purchaser of their housing project who has paid the full purchase price would obtain the subdivided title in his name.

[65] Under the standard form SPA in Schedule G under the Housing Regulations in cl. 3(1), it is provided as follows:

3. Property free from encumbrances before the Purchaser takes vacant possession of the said Building.

(1) The *Proprietor and the Vendor shall not* immediately and at any time after the date of execution of this Agreement *subject the said Land to any encumbrances without the prior approval of the Purchaser* and *the Proprietor and the Vendor hereby undertakes that the said Property shall be free from encumbrances* immediately prior to the Purchaser taking vacant possession of the said Building. (emphasis added)

[66] It is clear from the above clause that the prior approval of the purchaser must first be obtained for the creation of the charge in favour of the appellant. It is not disputed that such an approval was not so obtained. The charge cannot be validly created in favour of the appellant in the circumstances of this case where the prescribed statutory contract contains such a clear prohibition. See the Court of Appeal case of *Ng Pak Mei v. Sierra Delima Development Sdn Bhd & Anor* [2020] 9 CLJ 101; [2020] 12 MLJ 465 at para. 5 which held as follows:

[5] On the second issue, whether the breach of the SPA in not obtaining the consent of the purchasers to create the charge has any bearing on the legality of the charge, His Lordship answered this in the negative. With respect we disagree with His Lordship. Section 24 of the HDA confers on the minister powers to make regulations for the purpose of carrying into effect the provisions of the HDA, resulting in reg. 11 of the Regulations 1989 being made. Regulation 11 provides that every contract of sale where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H. Therefore, it is our considered view that cl. 3 of the SPA (which is the standard form contract prescribed by Schedule H) requires mandatory conformity by the parties. The legislative intent in the said cl. 3 which binds the affected parties makes it clear that the developer shall not at any time after the execution of the SPA, subject the land to any encumbrances (in the present case the creation of the charge) without the prior consent of the purchasers where parties are not allowed to depart from. In this regard, it is not a matter of dispute by the respondents that no such required consent was obtained from the original purchasers prior to the creation of the said charge.

[67] On appeal to the Federal Court by the chargee in Civil Appeal 02(f)-11-03-2021(B), the Federal Court's record shows the parties recorded on 17 August 2021 a consent order.

[68] Even though the proprietor SPNB had given an irrevocable PA to the developer for the purpose of the joint-venture, the legal obligation still rests jointly with SPNB and the developer to ensure that the purchaser receives a title free from all encumbrances at the end of the day, once the full purchase price is paid. SPNB's legal recourse is against the developer for any losses that it may suffer as a result of the developer exceeding its authority under the PA.

[69] In the Court of Appeal case of *Foong Seong Equipment Sdn Bhd v. Keris Properties (PK) Sdn Bhd* [2011] 4 CLJ 42, it was stated that:

> [21] A plain reading of the mandatory provisions contained in reg 11 reveals that it provides for two categories of the standard statutory sale and purchase agreement. The sale and purchase agreement for housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G. In the case of subdivided building, it shall be in Schedule H. The parties thereto are not permitted to contract out of it. As a general rule, compliance with these statutory contracts of sale is mandatory; an exception arises only with the approval of the controller of housing, in the form of a certificate in writing, in order to waive or modify the provisions thereof.
>
> [22] The recital and preamble to the statutory contracts of sale expressly provide for the parties thereto.
>
> [23] Where the vendor is both the housing developer as well as the proprietor of the land, the recital and preamble provide for a bilateral contract, to which the parties are the housing developer-cum-proprietor and the purchaser. The contract of sale allows the deletion of the particular part of the contract of sale which is not applicable.
>
> [24] Where the vendor is the housing developer, but the proprietor of the land is a different entity, as in the JVA in the instant appeal, the recital and preamble to the contract of sale provide for a tripartite contract, which includes the vendor (of the first part), the purchaser (of the second part) and the proprietor of the land (of the third part).
>
> [25] Hence, *it is not correct to say that the Act applies only to a developer's contract of sale with the purchaser, without the involvement of the proprietor of the land. The Act obviously involves the land proprietor who has entered into a joint venture agreement with the housing developer to develop the land on a joint venture basis, such as the JVA in the instant appeal* ... (emphasis added)

[70] See also the principle that the donor as principal is bound by the actions of its donee as agent under a PA as decided in the case of *Choo Ah Kow v. Yeow Yew Thiam & Anor* [1989] 1 CLJ 128; [1989] 1 CLJ (Rep) 14 at p. 16 para. a-b as follows:

> In this case, although the second defendant (the attorney) and not the first defendant (the principal) had executed the sale and purchase agreement as a vendor, the obligation to transfer the property or alternatively to pay damages and to return the purchase price was in law imposed on the first defendant. By virtue of the power of attorney, the first defendant should be bound by the act of his attorney as if the sale agreement was executed by him personally. Normally liability would therefore be joint and not several - there being only one obligation. Performance by one would discharge the other and consequently, depending on the facts of each case the principle of election would apply. As provided by s. 179 Contracts Act 1950,

> Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

[71] The appellant is not without its remedy for it had already sued the developer in a separate suit and obtained judgment against it for the whole of the loan outstanding as informed to us by learned counsel for the appellant. Additionally, it had also obtained an order for sale for all the 60 titles charged except for three of them that had a similar problem.

Whether As A Matter Of Public Policy And Taking Into Consideration Competing Equities, The Title Of The First Purchaser Should Prevail Over The Second Charge

[72] As the appellant had failed to obtain an order for sale of the purchaser's title, presumably on ground of the existence of "cause to the contrary" within the meaning of s. 256(3) of the NLC which provides as follows:

> (3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

[73] Based on the authority of the Federal Court in *Thameez Nisha Hasseem v. Maybank Allied Bank Bhd* [2023] 5 CLJ 874; [2023] 4 MLJ 145, the court is empowered under s. 340(4)(b) of the NLC to determine the question of title or interest by operation of law – which determination would affect the indefeasibility or otherwise of the title or interest and in this case to cancel the charge in question. This can be seen in paras. [121] and [133] as follows:

> [121] Thus, while MABB may theoretically be entitled to claim under the agreement, based on the charge created, its alleged rights or interests are nevertheless legally unenforceable by the lapse of the statutory limitation period. That means, MABB can no longer bring an action in law to enforce or to claim what it regarded as the registrable rights or interests under the charge.
>
> …
>
> [133] When the statutory limitation period lapses and is successfully established, the court is legally empowered to determine the question of title or interest by operation of law in s. 340(4)(b) of the NLC – which determination has the effect on the indefeasibility or otherwise of the title or interest.The facts and circumstances of the present case illustrate the application of the statutory limitation in the operation of the 'determination of title or interest by operation of law'.

[74] Under s. 24(2) of the HDA, the Minister may make regulations with respect to the following:

A (c) **prescribe the form of contracts which shall be used by a licensed housing developer,** his agent, nominee or purchaser both as a condition of the grant of a licence under this Act or otherwise;

(d) regulate payments (under whatever name these may be described) which may be made by a purchaser either before, during or after the
B construction or completion of the house, flat or other accommodation for which that purchaser is required to make the payments, including the amount of the payments, the time when the payments become due and conditions that shall be fulfilled by a licensed housing developer before he may ask for the payments;

C (e) **regulate and prohibit the conditions and terms of any contract between a licensed housing developer,** his agent or nominee and his purchaser;

(g) prescribe that any act or omission in contravention of any of the regulations shall be an offence and provide for the penalties therefor either by way of fine or imprisonment or both: provided that any fine so
D provided shall not exceed fifty thousand ringgit and a term of imprisonment so provided shall not exceed five years, and in addition thereto may also provide for the cancellation and suspension of a licence issued under this Act. (emphasis added)

[75] The Minister had, pursuant to s. 24 of the HDA, made the Housing
E Regulations and under reg. 11 it is provided as follows:

(1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale is for the sale and purchase of a housing
F accommodation in a subdivided building, in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H.

[76] Clause 3(1) of Schedule G contains a prohibition against a proprietor and developer subjecting the land sold to any encumbrance upon the
G execution of the SPA with a purchaser.

[77] As far back as the Federal Court case of *SEA Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305; [1982] 2 MLJ 31, Suffian LP observed as follows at p. 34 para. A-B, LH:

H It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, **Parliament found it necessary to regulate the sale of houses and protect**
I **buyers by enacting the Act.** (emphasis added)

[78] The standard form SPA has evolved through the years to the current form of Schedule G agreement with terms and conditions more protective of the purchaser's interest such that contracting out is prohibited. See reg. 11(1).

[79] Whilst we appreciate that a Minister's or even a Government's policy may not be public policy, here is a case where the policy of ensuring that a purchaser of a housing accommodation from a developer should get the subdivided title in his name has remained constant and consistent throughout with a prohibition against encumbrancing the said title and eventually ensuring that the purchaser's title to the housing accommodation is duly registered in his name upon vacant possession being handed to him on completion of the housing project.

[80] Moreover, the HDA is a piece of social legislation with the following implications as observed by the Federal Court in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor & Other Appeals* [2021] 2 CLJ 441:

> [1] The phrase "social legislation" attached to the Housing Development (Control and Licensing) Act 1966 ("HDA 1966") and its ensuing subsidiary legislation, *ie*, the Housing Development (Control and Licensing) Regulations 1989 ("HDR 1989") is not merely a fanciful label. In disputes between home buyers and housing developers, its significance lies in the approach taken by the courts to tip the scales of justice in favour of the home buyers given the disparity in bargaining power between them and the housing developers.
>
> …
>
> [27] That **the HDA 1966 and its subsidiary legislation are social legislation is settled beyond dispute** (see the decisions of the Federal Court in: *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011] 2 MLJ 141 and *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281).
>
> [28] The long title of a statute is relevant to its interpretation (see s. 15 of the Interpretation Acts 1948 and 1967). The long title of the HDA 1966 provides in no uncertain terms that it exists, in Peninsular Malaysia, for the protection of the interest of purchasers and for matters connected therewith.
>
> …
>
> [31] All legislation is social in nature as they are made by a publicly elected body. That said, not all legislation is "social legislation". A social legislation is a legal term for a specific set of laws passed by the Legislature for the purpose of regulating the relationship between a weaker class of persons and a stronger class of persons. Given that one side always has the upper hand against the other due to the inequality

A of bargaining power, the State is compelled to intervene to balance the scales of justice by providing certain statutory safeguards for that weaker class. A clear and analogous example is how this court interpreted the Industrial Relations Act 1967 in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369 ("*Hoh Kiang Ngan*").

B …

[33] With the greatest of respect, it is our view that the submission is untenable. When it comes to interpreting social legislation, the State having statutorily intervened, the courts must give effect to the intention of Parliament and not the intention of parties. Otherwise, the attempt by the Legislature to level the playing field by mitigating the inequality of
C bargaining power would be rendered nugatory and illusory.

…

[130] The courts will not countenance the bypassing of statutory safeguards **meant to protect the purchasers.** To that extent, where the
D developers act in contravention of the law, they have to accept the resulting consequences. (emphasis added)

[81] SPNB, established since 1997, has as its avowed mission, to provide affordable housing to the lower income community of Malaysia. It would be disastrous for the individual purchaser to lose everything that he had paid for
E merely because the developer had encumbered his property to a lender and defaulted in the process.

[82] The court takes judicial cognisance of the fact that in many of these housing developments, the purchasers are recommended to use the services of solicitors in the developer's panel of solicitors and that as the master title
F would be submitted for subdivision, the purchasers are prohibited from entering caveats against the master title. Even when the subdivided title had been issued, most purchasers would not know of their right to caveat the title as they do not expect the developer to double sell or charge the property they have bought.

G **[83]** Here the SPA was prepared by Messrs Shaik Azrin & Co with address at No. 21A, Jalan SS21/37 Damansara Utama 47400 Petaling Jaya, Selangor. The same solicitor by the name Shaik Azrul bin Shaik Daud attested for the proprietor SPNB, the vendor and the purchaser.

H **[84]** Even in a case of a cash purchaser like the plaintiff here, any undertaking from the developer to disclaim any interest in the property would be good contractually only. Until legislation is enacted or the HDA is amended to foolproof purchaser's title over the property purchased from a developer against further interest or title being created by the developer, whether mistakenly, negligently or fraudulently, this court may invoke
I public policy to safeguard the interest of the first purchaser who often would have no resources to protect himself but to trust the good office of the developer and more so when it is backed by a Government agency in SPNB as the proprietor of the development.

[85] We appreciate the purpose served by a caveat as enunciated in *Ong Chat Pang & Anor v. Valliapa Chettiar* [1971] CLJU 96; [1971] 1 LNS 96; [1971] 1 MLJ 224 and *Thye Seng & Company Sdn Bhd & Ors v. Universal Trustee (Malaysia) Bhd & Ors* [2016] CLJU 1707; [2016] 1 LNS 1707; [2016] MLJU 1431, but these are not cases involving a purchaser and a housing developer where under the prescribed statutory contract in Schedule G or H, the proprietor and the developer as vendor cannot encumber the property once a sale and purchase agreement has been signed and they further undertake that the property shall be free from encumbrances immediately prior to the purchaser taking vacant possession of the property. See cl. 3(1) of Schedule G.

[86] In the present case, the purchaser had taken vacant possession, collected the keys, paid the utility deposits and maintenance fees as well as the stamp duty for the memorandum of transfer. See para. [62] of the High Court GOJ.

[87] Looking at the totality and justice of this case, the appellant as the lender, having being alerted to the fact that the charge was executed *via* a PA, would have been put on inquiry and would have the resources to scrutinise the PA and the supplementary agreement referred thereto.

[88] The appellant as a lender, like all lenders, would not be lending based on the full market value of the 60 properties charged to it as security for the loan of RM3.54 million (See encl. 5 at pp. 89 to 90 pdf Schedule of titles and encl. 6 at p. 42). In fact in this case, the loan of RM3.54 million is secured over properties worth about RM4.8 million; each property being sold for at least RM80,000 being its purchase price.

[89] It would appear that in this case the moneylender only lent up to about 74% of the market value of the landed properties so that upon default, as in this case, the lender may still be able to have a buffer to recover its loan or the balance thereof *via* a public auction under an order for sale by the court. The appellant as lender is in a position to cushion the risk of default by the developer whereas the purchaser stands to lose everything.

[90] The plaintiff's pleaded case against D1 SPNB and D2 the developer is that of negligence and/or conspiracy to injure the plaintiff. D1 denied the allegations and stated that it had left everything in the charge of D2 under the joint-venture agreement in consideration of cash payments and completed units and the construction of a tahfiz school and a mosque for the housing project.

[91] The developer as D2, having gone into liquidation on 27 July 2020, did not file any defence and was absent at trial. Thus, the plaintiff's allegation against D2 was not rebutted.

[92] We are not unaware that ever since the 19th century, public policy has often been described as an "unruly horse" and judges have expressed caution in relying on public policy as a basis in decision-making. As remarked by Burrough J in *Richardson v. Mellish* (1824) 2 BING 229; His Lordship said at p. 303 as follows:

> [252] … I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; – it is a very unruly horse, and when once you get astride it you never know where it will carry you.

[93] However, with the passage of time and the growing experience of the court, what was once "unruly" could now be bridled and tamed and we share in the audacity of hope expressed by Lord Denning in *Enderby Town Football Club Ltd v The Football Association Ltd and another* [1971] 1 All ER 215, where His Lordship stated at p. 219 para. d-e as follows:

> I know that over 300 years ago Hobart CJ said that 'public policy is an unruly horse'. It has often been repeated since. So unruly is the horse, it is said, that no judge should ever try to mount it, lest it run away with him. I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice, as indeed was done in *Nagle v. Feilden*. It can hold a rule to be invalid, although it is contained in a contract.

[94] Our courts have no compunction in invoking public policy where circumstances and the peculiar facts of the case justify it. The Federal Court in *Theresa Chong v. Kin Khoon & Co* [1976] CLJU 165; [1976] 1 LNS 165; [1976] 2 MLJ 253 observed that it is the duty of the court to invoke public policy where evidence reveals that a contract or action is contrary to the public interest, and stated at p. 255 para. D-E, RH as follows:

> ... where it appears from the evidence during the hearing of a case that the contract sued on is contrary to public policy it is the duty of the judge to take the objection that contract is illegal and void. The cases of *Scott v. Brown, Doering, McNab & Co.* [1892] 2 QB 724 and *Montfiore v. Menday Motor Components Co. Ltd.* [1918] 2 KB 241 were cited in support of this submission.

[95] Granted caution should be exercised as observed by Gill CJ (Malaya) when referring to the *dicta* of Asquith LJ in *Monkland v. Jack Barclay Ld.* [1951] 2 KB 252 at p. 265, which reads:

> ... The courts have again and again said that, where a contract does not fit into one or other of these pigeon holes, but lies outside this charmed circle, the courts should use extreme reserve in holding such a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest …

[96] In the present case, the public policy imperative is to protect the first purchaser's right to the property, which would be unjustly defeated if the appellant's charge is allowed to stand. Allowing financial institutions to assert charges against a purchaser's equitable interest would directly undermine public confidence in property transactions especially in housing development cases under the statutory contract regime provided in the HDA and its Housing Regulations designed to protect innocent house buyers who have no good reason to suspect that the developer would charge to a lender the property already sold to them.

[97] Recently the UK Supreme Court in its leading authority in *Patel v. Mirza* [2017] AC 467 invoked public policy considerations in establishing a trio of considerations for determining if a claim related to an illegal act would be contrary to public policy as follows:

> 101. … (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality …

[98] The approach in *Patel* had been followed by our Federal Court in *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2019] 1 CLJ 183; [2019] 4 MLJ 141 and in *Tan Keen Keong v. Tan Eng Hong Paper & Stationery Sdn Bhd & Ors And Other Appeals* [2021] 2 CLJ 318; [2021] 3 MLJ 914. In *Patel*, Lord Toulson reiterated the importance of upholding public policy by stating (at para. 120):

> 120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

[99] Therefore, this court would not hesitate, after careful consideration, to invoke public policy to preserve and protect the interest and title of the innocent purchaser who otherwise would be left high and dry without any effective remedy as the developer had gone into liquidation.

Decision

[100] For the reasons given above, we found no merits in the appeal of the appellant as the chargee of the property in question. We had therefore dismissed the appeal and upheld the decision of the High Court.

[101] We ordered costs of RM15,000 to the respondent purchaser subject to the allocatur.